APPEAL NO. 032044
FILED SEPTEMBER 22, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on July 1, 2003. The hearing officer determined that the appellant/cross-respondent's (claimant herein) compensable injury does extend to and include herniations at C4-5 and C5-6, but does not extend to include a lumbar spine injury or depression. The claimant files a request for review in which she argues that the hearing officer's findings that her injury does not extend to include a lumbar injury or depression have no basis in the evidence. The respondent/cross-appellant (carrier herein) also files a request for review in which it contends that the hearing officer's decision that the claimant's injury extends to include two cervical disc herniations is contrary to the evidence. While neither the claimant nor the carrier files a separate response to the other's request for review, both argue in their respective requests for review that the determinations made by the hearing officer which are favorable to them should be affirmed.

DECISION

The claimant's appeal not having been filed timely, the decision and order of the hearing officer regarding the injury not extending to or including an injury to the lumbar spine or depression have become final pursuant to Section 410.169. Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

Pursuant to Section 410.202(a), a written request for appeal must be filed within 15 days of the date of receipt of the hearing officer's decision. Section 410.202 was amended effective June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code from the computation of time in which to file an appeal. Section 410.202(d). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(c) (Rule 143.3(c)) provides that an appeal is presumed to have been timely filed if it is mailed not later than the 15th day after the date of receipt of the hearing officer's decision and received by the Texas Workers' Compensation Commission (Commission) not later than the 20th day after the date of receipt of the hearing officer's decision. Both portions of Rule 143.3(c) must be satisfied in order for an appeal to be timely. Texas Workers' Compensation Commission Appeal No. 002806, decided January 17, 2001.

Commission records indicate that the hearing officer's decision was mailed to the claimant on July 10, 2003. Under Rule 102.5(d), unless the great weight of evidence indicates otherwise, the claimant is deemed to have received the hearing officer's decision five days after it was mailed; in this case deemed receipt is July 15, 2003. An attorney in the law firm representing the claimant states in an affidavit attached to the claimant's request for review that "[w]e received a copy of the hearing officer's decision & order on July 16, 2003." This statement does not make it clear as to whether July 16,

2003, is supposed to be the date of receipt by the claimant or by the claimant's attorney. We have held many times that it is receipt by the party, and not the party's attorney, that is controlling. Also, the Appeals Panel has held that when Commission records show mailing to the claimant on a particular day at the correct address, the mere assertion that the decision was received after the deemed date of receipt is not sufficient to extend the date of receipt past the deemed date of receipt provided by Commission rule. *See* Texas Workers' Compensation Commission Appeal No. 022550, decided November 14, 2002. Thus the claimant was deemed to have received the hearing officer's decision on July 15, 2003. The claimant's appeal needed to be mailed no later than August 5, 2003, the 15th day from the deemed date of receipt. The claimant's appeal is postmarked as being mailed on August 11, 2003. In the affidavit attached to the claimant's appeal, an attorney in the law firm representing the claimant states that the attorney assigned to the claimant's case was in the hospital so he (the affiant) personally took the claimant's request for review to the post office on August 6, 2003, but in his haste did not affix adequate postage. The post office apparently returned the request for review and then it was remailed to the Commission on August 11, 2003. Of course, even if mailed on August 6, 2003, the request for review would have been untimely. Further, even had the claimant had until August 6, 2003, we have held that when a party's appeal is returned for insufficient postage and is remailed to the Commission, the Appeals Panel uses the postmark on the remailing to determine if the appeal was timely mailed. Texas Workers' Compensation Commission Appeal No. 010216, decided March 5, 2001. The claimant's appeal would have been untimely even if the claimant had until August 6, 2003, to mail the appeal, which the claimant did not. The claimant's appeal is untimely, and the determinations of the hearing officer that the claimant's injury did not extend to include an injury to her lumbar spine or depression have become final pursuant to Section 410.169.

As far as the carrier's appeal is concerned, we have held that the question of the extent of an injury is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming

weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In the present case, there was simply conflicting evidence, and it was the province of the hearing officer to resolve these conflicts. Applying the above standard of review, we find that the hearing officer's decision was sufficiently supported by the evidence in the record.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

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Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

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Margaret L. Turner
Appeals Judge